the fifth class and county attorney, then inasmuch as a county attorney is an employee as distinguished from the holder of a "lucrative office," there would be no violation of the Indiana Constitution, Art. 2, Sec. 9, *supra*, by the simultaneous holding, by one individual, of the positions of city attorney and county attorney, and this regardless of whether said city attorney be appointed a member of the board of public works and safety.

Due to varying factual situations attendant upon a consideration of various positions, in any given instance, it is my opinion that the responsibility for a determination as to whether such employment or appointment would be against public policy, whether the duties of the two positions would be incompatible with each other, and whether there is a conflict of interests in such employment, rests with the appointing authority.

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**OFFICIAL OPINION NO. 15**

March 10, 1964

Hon. William C. Christy  
State Senator  
7106 Grand Avenue  
Hammond, Indiana

Dear Senator Christy:

This is in response to your request for my Official Opinion clarifying the purpose and effect of House Joint Resolution 22, passed by the Special Session of the 1963 General Assembly and filed in the office of the Secretary of State on April 20, 1963. This resolution proposes amendments to the Indiana Constitution, Art. 10, Sec. 1 and Art. 10, Sec. 8. Before such a change could become effective, it would be necessary, of course, for the proposal to be referred to the General Assembly, chosen at the next general election, and if such General Assembly should agree to such proposed amendments, then the same would be required to be submitted to the electors of the state for ratification as provided by the Indiana Constitution, Art. 16, Sec. 1. Therefore, it is stressed that this
Opinion does not concern the interpretation of an existing constitutional provision nor duly-enacted statute, but rather proposed constitutional amendments which conceivably may never become effective.

House Joint Resolution 22, as published in the Acts of 1963 (in the portion thereof consisting of acts passed by the Special Session of the 1963 General Assembly), being the Acts of 1963 (Spec. Sess.), Ch. 48, on p. 228, provides as follows:

"A JOINT RESOLUTION proposing an amendment to Section 1 of Article 10 of the Constitution of the State of Indiana by permitting the General Assembly to exempt certain property from the property tax under certain conditions, and to Section 8 of Article 10 of the Constitution of the State of Indiana by prohibiting graduation of rates upon income tax.

"Be it resolved by the General Assembly of the State of Indiana:

"SECTION 1. The following amendment to the Constitution of the State of Indiana is hereby proposed and agreed to by this the Ninety-third General Assembly of the State of Indiana, and is hereby referred to the next General Assembly for reconsideration and agreement.

"SEC. 2. Section 1 of Article 10 of the Constitution of the State of Indiana is amended to read as follows: Sec. 1. (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly MAY exempt from property taxation any property in any of the following classes:

"(1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;

"(2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or con-
sumed in connection with the production of income, or property being held as an investment;

“(3) Intangible personal property.

“(b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefor.

“SEC. 3. Section 8 of Article 10 of the Constitution of the State of Indiana is amended to read as follows: Sec. 8. The General Assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law: Provided, however, that any graduation of rates upon any income tax authorized by this section shall be unlawful.” (Our emphasis)

With reference to the Indiana Constitution, Art. 10, Sec. 1, as the same now exists, the authorization for the enactment of statutes providing for the exemption of property from property taxation is confined to such only as is used “for municipal, educational, literary, scientific, religious, or charitable purposes * * *” The language which has been emphasized in House Joint Resolution 22, supra, in Sec. 2 thereof, therefore represents the changes and additions which the Special Session of the 1963 General Assembly has proposed to make to the Indiana Constitution, Art. 10, Sec. 1, referred to hereafter.

Referring to the Indiana Constitution, Art. 10, Sec. 8, referred to hereafter, as the same now exists, it may be stated that the only change proposed by the 1963 Special Session is the addition of the proviso, which has been emphasized in House Joint Resolution 22, supra, and is contained in Sec. 3 thereof.

I.

Because House Joint Resolution 22, Sec. 2, concerns the proposed amendments to the Indiana Constitution, Art. 10, Sec. 1, relating to property taxation, the proposed changes to that section of the Constitution will be first discussed.

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(a) (1). Paragraph (a) (1) of proposed Section 1 will not effect any change with respect to the class of property therein mentioned which may be exempted from taxation by the General Assembly, for the reason that said section of the Constitution, at present, authorizes the enactment of statutes exempting property used only for municipal, educational, literary, scientific, religious or charitable purposes.

(a) (2). Paragraph (a) (2) of proposed Section 1 is entirely new and is the subsection with which your inquiry is particularly concerned. To understand the meaning of the language in said subsection, it is important to refer to the fact that various proposals have, in past years, been discussed for the exemption of certain classes of property, particular reference being made to so-called "household goods." In 1954 O. A. G., page 58, No. 18, this office issued an Official Opinion holding, at page 65, that under the Indiana Constitution:

"2. It would not be possible to exempt household furnishings and equipment from the personal property tax rolls specifically by statute, without constitutional amendment." (Our emphasis)

Furthermore, the 1961 General Assembly enacted the Acts of 1961, Ch. 325, which was an attempt to classify household goods for special tax treatment, the presumed assessed valuation of which was to have been a fixed percentage of the assessed valuation of the improvements in which such household goods were kept and maintained. In the case of Finney v. Johnson (1962), 242 Ind. 465, 179 N. E. (2d) 718, the Indiana Supreme Court held that the Acts of 1961, Ch. 325 was unconstitutional as being in violation of the Indiana Constitution, Art. 10, Sec. 1. While the court stated that it was not, in that case, concerned with any question as to a uniform rate of taxation or any question as to exemption from taxation, the court did say that the decision was concerned with the requirement that the valuation must be "just" on all property, from which the inference may be drawn that a statutory exemption of household goods would probably not be constitutional without constitutional amendment.

While the language of proposed Section 1, Paragraph (a) (2), does not, in express terms, authorize the exemption
of household goods from property taxation, it will be seen that the wording of the paragraph is apparently intended to have that effect. Paragraph (a) (2) exempts:

"Tangible personal property other than [ ]
property being held for sale in the ordinary course of a trade or business,

property being held, used or consumed in connection with the production of income, or property being held as an investment;"

Thus, under this paragraph, the classes of tangible personal property which would be ineligible for exemption are those classes of property being held for sale in the ordinary course of a trade or business, together with property being held, used or consumed in connection with the production of income, or property which is being held as an investment. Because household goods, in the hands of a householder and used by the owner for his personal comfort in his own living quarters, or living quarters rented by him, would not qualify as being held for sale in the ordinary course of a trade or business, nor as property held, used or consumed in connection with the production of income, nor as property held as an investment, therefore, the indirect effect of this language would be to authorize the General Assembly to exempt household goods, which would be one of the classes of property includible in tangible personal property not used for business, income or investment purposes. This paragraph would seem to establish as the standard for statutes providing for the exemption of tangible personal property that such property be both owned and used by the owner for other than a trade, business, income-producing or investment activity.

(a) (3). To understand the probable intent of Paragraph (a) (3) of proposed Section 1, which would authorize statutes for the exemption of intangible personal property, it should be remembered that under the present intangibles' tax law, being the Acts of 1933, Chs. 81, 82 and 83, as amended, as founds in Burns' (1961 Repl.), Section 64-2701 et seq., it is provided that the payment of the tax thereby imposed by the 1933 Acts shall be in lieu of all taxes which may be imposed upon intangibles except the gross income, inheritance and
estate taxes. Although the constitutionality of the intangibles’ tax statutes was upheld by the Indiana Supreme Court in the case of Lutz v. Arnold (1935), 208 Ind. 480, 193 N. E. 840, 196 N. E. 702, it is noteworthy that said decision was criticized by the Indiana Supreme Court in the case of Wright v. Steers (1962), 242 Ind. 582, 179 N. E. (2d) 721, 726, when the court, referring to Lutz v. Arnold, *supra*, stated:

“The majority decision in the Lutz case spends a large portion of the opinion explaining the history of taxation of intangibles; the difficulty of taxation of intangibles, and the amount of income which had resulted from the imposition of the new tax. Those matters which go to the merit of the legislation are not elements which a court is entitled to consider in determining the constitutionality of an Act.

“We have no right to go into the merits of the proposed tax. Whether an Act is wise or expedient is a matter for the legislature—not the courts. Those matters have no bearing on the constitutionality of the legislation. Our duty is to measure the constitutionality of a law by the yardstick of the Constitution. The Constitution is made to be observed by public officials and judges. If the legislation is meritorious, yet unconstitutional, the amending clause of the Constitution offers the avenue for a change, rather than through a strained, judicial interpretation by the court.

“The weakness of the reasoning in the Lutz case is apparent, and this court is not inclined to extend the application of the case, but restrict it to its most narrow application and the facts there involved. 1960 O. A. G. No. 48, p. 288.”

Thus, because of the above-quoted language from Wright v. Steers, *supra*, it would appear that Paragraph (a) (3) of proposed Section 1 was intended to provide specific constitutional authority for statutes providing for the exemption of intangible personal property from property taxation.

(b) The language in Paragraph (b) of proposed Section 1 might also be attributed to the court's decision in the case of Wright v. Steers, *supra*. In that case, the Indiana Supreme
Court held that the Acts of 1961, Ch. 345, which imposed an excise or license tax upon motor vehicles and mobile homes "in lieu of the ad valorem property tax levied for state or local purposes," was unconstitutional as being in violation of the Indiana Constitution, Art. 10, Sec. 1. As the court stated at p. 725 of 179 N. E. (2d):

"This court has said:

"'No class of property is exempt from taxation unless it is "especially exempted by law"; and only property used for "municipal, educational, literary, scientific, or charitable purposes" can be "specially exempted by law." Article 10, § 1, Indiana Constitution.' Stark v. Kreyling (1934), 207 Ind. 128, 132, 188 N. E. 680, 681." (Our emphasis)

Thus, the holding in Wright v. Steers, supra, in substance, was that property, such as motor vehicles and mobile homes, cannot now be exempted from the ad valorem tax in consideration of an excise tax being levied upon such property in lieu of the ad valorem tax. Thus, Paragraph (b) of proposed Section 1, if finally ratified, would expressly authorize the exemption from property taxation of motor vehicles, mobile homes, airplanes, boats, trailers or similar property if an excise tax thereon were substituted for the property tax. Thus, this proposed amendment to the Indiana Constitution, Art. 10, Sec. 1, is clearly to overcome the effect of the decision of the Indiana Supreme Court in the case of Wright v. Steers, supra.

II.

Referring now to the Indiana Constitution, Art. 10, Sec. 8, which is the section to which the proposed amendment found in House Joint Resolution 22, Sec. 3, refers, it will be seen that the present constitutional provision relating to income taxation contains no limitation, but, instead, provides broadly for the levy and collection of a tax upon income from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law. This is not an enabling provision in the Constitution, because it has been held repeatedly that the power of taxation is inherent in sov-
ereignty and that provisions respecting taxation in a constitution operate by way of limitation and not by way of grant. See:

Union Pacific R. Co. v. Peniston (1873), 85 U. S. 5 at p. 29, 21 L. Ed. 787;

Bell's Gap R. Co. v. Pennsylvania (1890), 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533;

State Board of Tax Commissioners of Indiana v. Jackson (1931), 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540;


Hart et al. v. Smith et al. (1902), 159 Ind. 182, 184, 64 N. E. 661.

Proposed Section 8 would add to the Indiana Constitution, Art. 10, Sec. 8, the following:

"* * * Provided, however, that any graduation of rates upon any income tax authorized by this section shall be unlawful."

Thus, the proviso proposed to be added to this section of the Indiana Constitution is one of limitation, so that a system of graduated rates in an income tax statute could not be imposed whereby rates are increased upon the basis of the amount of taxable income subject to the tax. Apparently, what is intended is that a system of graduated rates in a state income tax law, such as is now present in the Federal Income Tax Law, could not be enacted. However, this limitation would not prevent rate classification in an excise tax law, including an income tax statute, if the different rates were based upon constitutionally-recognized classifications whereby income from one activity might be taxable at a different rate from income derived from a substantially distinguishable activity, so that a rational basis would yet exist for the classification of income for tax rate purposes. Thus,
the proviso proposed to be added to the Indiana Constitution, Art. 10, Sec. 8, by House Joint Resolution 22, Sec. 3, would appear to be aimed at preventing graduated tax rates upon income where the graduation would be based upon the amount of income subject to the tax.

In closing I wish to emphasize that, unlike the Federal system for the enactment of statutes and proposed changes to the Federal Constitution, there are no published committee reports concerning enactments of the Indiana General Assembly nor concerning amendments to the Indiana Constitution proposed by that body from which more conclusively to ascertain legislative intent. Therefore, it should be remembered that the guides for the interpretation of the proposed amendments, as found in House Joint Resolution 22, must be confined to the existing case law and a general knowledge of the apparent infirmities which the language seems to have been intended to correct. Therefore, this Opinion, of necessity, has had to be stated in general terms, since it is impossible, at this time, to state with any degree of certainty all of the various special effects which such an amendment to the Constitution might have. Moreover, attention is directed to the fact that if House Joint Resolution 22 is ultimately ratified by the electors, thereby amending said provisions of the Indiana Constitution, nevertheless, with respect to the exemptions which would thereby be authorized under the new Art. 10, Sec. 1, such exemptions would further require the enactment of specific legislation with respect to the property to be exempted under such section of the Constitution, for the reason that Art. 10, Sec. 1, if so amended, would yet merely constitute an enabling provision, whereby the Legislature in the future would have the authority to grant such exemptions by statute.